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| UNITED STATES OF AMERICA |) | |
| |) | PROSECUTION RESPONSE TO |
| |) | DEFENSE MOTION ALLEGING |
| v. |) | IMPROPER PRETRIAL |
| |) | DETENTION UNDER |
| |) | INTERNATIONAL LAW |
| DAVID M. HICKS |) | 15 October 2004 |
| |) | |

1. Timeliness. This Prosecution response is being filed within the time frame established by the Presiding Officer.

2. Position on Motion. The Prosecution requests that this Motion be denied.

3. Overview. The Accused has been afforded all rights due under United States and international law. The Law of Armed Conflict, not the authority cited by defense, applies to the detention of the Accused.

4. Facts.

a. On 11 September 2001, members of the al Qaida terrorist network hijacked four American commercial airliners with the intent to attack prominent targets in the United States. The hijackers intentionally crashed two airlines into the World Trade Center in New York City, New York, and one airliner into the Pentagon in Arlington, Virginia. A fourth airliner crashed in a field in Shanksville, Pennsylvania after the airliners' passengers attempted to re-take the plane. More than three thousand persons died in these attacks. *See The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States*, pgs. 4-14 (2004).

b. On 18 September 2001, Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Authorization for Use of Military Force*, 115 Stat. 224 (2001).

c. On 7 October 2001, the President ordered the air campaign against the Taliban regime in Afghanistan and al Qaida to begin. On 21 October 2001, the U.S. began ground operations against Taliban and al Qaida forces.

d. On 13 November 2001, the President authorized the use of military commissions to try persons Accused of either engaging, aiding, abetting, or conspiring to commit acts of international terrorism.

e. On or about early December 2001, the Accused, an Australian citizen, was captured by the Northern Alliance near Baghlan, Afghanistan and soon transferred to U.S. forces. At the time of his capture, the Accused was fighting with al Qaida forces against the U.S. forces.

f. The Accused arrived at the United States Naval Base in Guantanamo Bay, Cuba on 17 January 2001 and is being held as unlawful enemy combatant.

g. On 9 June 2004, the Appointing Authority for Military Commissions, Mr. John D. Altenburg, Jr., approved the charges against the Accused and directed trial by Military Commission to be convened at a later date.

h. On 25 August 2004, the Accused made his initial appearance before the Military Commission.

i. The armed conflict with the al Qaida terrorist network and the Taliban continues. As of 22 September 2004, over 16,000 U.S. service members are deployed in Afghanistan in support of this armed conflict.

5. Discussion.

Pursuant to the Laws of Armed Conflict, the United States has the fundamental right to capture and detain lawful combatants and to capture, detain, and try unlawful combatants for law of war offenses. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004), citing *Ex parte Quirin*, 317 U.S. 317, 1, 28 (1942). Defense erroneously applies an inapplicable body of law, specifically, the International Covenant on Civil and Political Rights (ICCPR) and Additional Protocol I to the Geneva Conventions (Additional Protocol I) to assert, incorrectly, that the accused is entitled to relief. The ICCPR and Additional Protocol I do not apply to these Military Commission proceedings.

a. International Covenant on Civil and Political Rights Does not Apply

(1) Defense relies almost exclusively on the International Covenant on Civil and Political Rights (ICCPR) to allege international law violations. However, such reliance is misplaced; the ICCPR does not apply to prosecutions for violations of law of war offenses and is, therefore, not relevant to Military Commission proceedings. By requesting relief under the ICCPR, the Accused is requesting that the Military Commission disregard United States law and decisions delivered since U.S. ratification of the ICCPR in 1992.

(2) The Coalition, including the United States, is engaged in an armed conflict with al Qaida and the Taliban. The Law of Armed Conflict applies to this war, not the ICCPR. The Laws of Armed Conflict regulate the interactions between belligerent states and the interactions between a state and individual members of enemy forces. The Law of Armed Conflict includes such treaties as the Hague and Geneva Conventions and was negotiated with the exigencies of war in mind. In contrast, the

ICCPR is part of a body of law known as Human Rights Law, a distinctly separate body of law. Treaties under Human Rights Law were not negotiated with the requirements of wartime in mind¹ and therefore cannot apply to the ongoing armed conflict. By placing such emphasis on the ICCPR for relief, Defense is sidestepping the applicable body of law, the Law of Armed Conflict.

(3) The President and the United States Senate at the time of ratification made clear that the ICCPR did not expand protections beyond those already provided under United States *domestic* law and in fact would not be applicable in any area that might conflict with the United States Constitution or laws. *See* Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) (“Nothing in this Covenant requires or authorizes legislation, or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”).² Despite explicit reservations and mention on the effect ratification of the ICCPR would have on domestic law, no mention is made on the applicability of the ICCPR on the Law of Armed Conflict.³ This silence indicates that the United States did not contemplate application of the ICCPR to the Law of Armed Conflict and military commissions. To argue otherwise would be to conclude that the President entered into a treaty in which he agreed, without comment, to limit his ability as Commander-in-Chief to wage war and detain enemy combatants. Such an argument is not plausible.

b. International Covenant on Civil and Political Rights is not Self-Executing

The ICCPR has no legal impact on the military commissions. The Senate, in ratifying the ICCPR, specifically stated that “the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.” Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992). As Assistant Secretary of State Richard Schifter explained during the Foreign Relations Committee’s hearing on the ICCPR, the non self-executing provision means that **“the Covenant provisions *when ratified, will not by themselves create private rights enforceable in U.S. courts*; that could be done by legislation adopted by Congress. *Since U.S. law generally complies with the Covenant, we do not contemplate proposing implementing legislation.*”**

¹ See Jean Pictet, *Humanitarian Law and the Protection of War Victims*, 15 (1975) (Humanitarian law is valid only in the case of armed conflict, while human rights are essentially applicable in peacetime...The two systems are complementary, and indeed they complement one another admirably, but they must remain distinct).

² See also Senator Clairborne Pell, Chairman, Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992) (the ICCPR is rooted in Western democratic traditions and values and guarantees basic rights and freedoms consistent with our own constitution and Bill of Rights).

³ The Senate’s silence on the applicability of the law of armed conflict on the ICCPR is significant as the treaty was the subject of much debate in the Senate. The ICCPR was adopted by the United Nations General Assembly on December 16, 1966 and entered into force on March 23, 1976. President Carter submitted the ICCPR to the Senate in 1979. The ICCPR was finally ratified by the Senate in 1992. *See* Senate Foreign Relations Committee, Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (April 2, 1992)

ICCPR Hearing at 18 (emphasis added). Treaties are binding agreements between States; individuals are not parties to treaties. The ICCPR, therefore, does not provide individuals with rights enforceable in U.S. courts. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004); *Wesson v. Warden*, 305 F.3d 343, 348 (5th Cir. 2002) (relief denied because treaty is not self-executing and Congress has not enacted implementing legislation).

c. Additional Protocol I is not Self-Executing

Additional Protocol I also has no legal impact on the military commissions. United States courts have held that the Geneva Conventions and Additional Protocol I are not self-executing, and therefore provide no basis for the enforcement of private rights in domestic courts. *United States v. Fort*, 921 F. Supp. 523, 526 (N.D. Ill. 1996). In essence, treaties are binding agreements between States. Private individuals have no standing to assert private rights in domestic courts on the basis of international treaties. *Id.* Defense cannot rely on Additional Protocol I for relief.

d. The following arguments are provided in response to Defense's specific assertions:

1) Power to Detain Enemy Combatants

a) The United States has the fundamental authority to capture and detain lawful combatants, and the authority to capture, detain, and try **unlawful** combatants. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004). The capture, detention, and trial of lawful and unlawful combatants "by universal agreement and practice," are "important incident(s) of war." *Id.* (citing *Quirin*, 317 U.S. at 28). The detention of combatants may last as long as active hostilities continue.⁴ *Hamdi*, 124 S. Ct. at 2640 citing Geneva Convention (III) Relative to the Treatment of Prisoners of War,⁵ Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3365. Upon the conclusion of active hostilities the detaining country must release and repatriate detainees **unless** the detainees are "being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences." *Id.* at 2641, citing Praust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int'l L. J. 503, 510-511 (2003).

b) The Supreme Court of the United States has specifically upheld the United States' authority to detain individuals who fought against the United States in Afghanistan as part of the Taliban regime. *Hamdi*, 124 S. Ct. at 2640. The United States' authority to detain members of the al Qaida network or the Taliban regime stems from Executive Authority⁶ and from Congress' Authorization to use Military Force

⁴ Longstanding international law recognizes that the purpose of detaining enemy combatants is to prevent captured individuals from returning to the field of battle and taking up arms once again. Navqi, *Doubtful Prisoner of War Status*, 84 Int'l Rev. Red Cross 571, 572 (2002)

⁵ The United States maintains that members of al Qaida and the Taliban are not entitled to Prisoner of War (POW) status but will be provided many POW privileges. See Fact Sheet, White House, Status of Detainees at Guantanamo (Feb. 7, 2002).

⁶ The Supreme Court in *Hamdi* chose not to resolve whether the Executive Branch had the authority to detain enemy combatants because it found that Congress had such authority. *Hamdi*, 124 S. Ct. at 2639.

(AUMF) against “nations, organizations, or persons” associated with the September 11, 2001 attacks. *Authorization for Use of Military Force*, 115 Stat. 224 (2001). It is clear, therefore, under the Laws of Armed Conflict and the Supreme Court’s interpretation of that law that the United States has the authority to capture and detain the Accused for the duration of the armed conflict against the al Qaida network and the Taliban. Only upon conclusion of the armed conflict must the United States either release and repatriate the Accused or prosecute the Accused as an unlawful combatant. *Hamdi*, 124 S. Ct. at 2640. The Accused’s assertion that he may not be held solely to prevent him from rejoining hostilities is contrary to the most fundamental doctrine in the Law of Armed Conflict recently affirmed by the Supreme Court. *See Hamdi*, 124 S. Ct. at 2640 (“the object of capture is to prevent the captured individual from serving the enemy.”).

c) Defense bases much of its argument of “unlawful detention” on the notion that the United States’ armed conflict in Afghanistan ceased in December 2001, presumably when Hamid Karzai was sworn in as chairman of the interim government in Afghanistan.⁷ This assertion is without merit. The Supreme Court, in its recent opinion of 28 June 2004, acknowledged that “active combat operations against Taliban fighters apparently are ongoing in Afghanistan.” *Hamdi*, 124 S. Ct. at 2642, (citing Constable, *U.S. Launches New Operation in Afghanistan*, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13, 500 United States troops remain in Afghanistan, including several thousand new arrivals); (J. Abizaid, Dept. of Defense, Gen. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, www.defenselink.mil/transcripts/2004/tr20040430-1402.html (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops)). Since the 28 June 2004 Supreme Court finding, the United States remains in an armed conflict in Afghanistan. *See, e.g.,* Squitieri, *Army begins sending more troops to Afghanistan*, Sept. 22, 2004 (reporting that the arrival of troops from the U.S. Army’s 82nd Airborne Division will bring the number of U.S. troops in Afghanistan to more than 16000). The United States, therefore, has the authority to detain the Accused from the time of his initial capture through the conclusion of the war, and beyond that since he is facing lawful prosecution. *Hamdi*, 124 S. Ct. at 2641.

2) “Arbitrary Arrest and Detention”

As discussed, the authority to capture, detain, and try unlawful enemy combatants is well-founded and fundamental. *Quirin*, 317 U.S. at 28; *Hamdi*, 124 S. Ct. at 2640. The Accused’s capture and detention as an unlawful combatant incident to the war with al Qaida is far from arbitrary. Furthermore, the United States has undertaken a thorough process to ensure that the Accused and other combatant detainees at Guantanamo Bay are properly classified. *See* Fact Sheet, Department of Defense, Guantanamo Detainees, (Apr. 13, 2004).⁸ The review of the Accused’s enemy combatant status began immediately upon the seizure of the Accused on the battlefield near Baghlan, Afghanistan. U.S. armed forces undertook a further review of the Accused’s combatant status prior to the Accused’s transfer to Guantanamo Bay on 17 January 2002. On 22

⁷ Hamid Karzai was sworn in as chairman on 22 Dec. 2001.

⁸ Available at www.defenselink.mil/news/Apr2004/d20040406gua.pdf

September 2004, a Combatant Status Review Tribunal, comprised of neutral decision-makers, convened to determine the Accused's combatant status, and determined that the Accused was properly designated as an enemy combatant. Finally, the legality of the Accused's detention is presently in federal court under *habeas corpus* review. See *Hicks v. Bush*, Civil Action No. 1:02-CV-00299 (CKK), United States District Court for the District of Columbia. Given all of these layers of review, it is clear that the Accused is properly detained as an enemy combatant.

3) Right to Be Informed of Reasons for Arrest and Challenge Legality of Detention

a) The provisions from the ICCPR and Additional Protocol I do not pertain. Nevertheless, in the wake of recent decisions of *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (in which the Accused was a Petitioner) and *Hamdi*, the United States established the Combatant Status Review Tribunal (CSRT). Department of Defense News Release, Combatant Status Review Tribunal Order Issues (July 7, 2004). The CSRT supplemented those processes already in place to ensure that a detainee was properly classified as an enemy combatant. In a CSRT, detainees can challenge their enemy combatant classification by testifying before the tribunal, calling witnesses, and introducing evidence. *Id.* The Accused's Combatant Status Review Tribunal convened on 22 September 2004 and determined that the Accused is properly detained as an enemy combatant.

b) Furthermore, the Accused has a pending *habeas corpus* action challenging the legality of his detention. *Hicks v. Bush*, Civil Action No. 1:02-CV-0029. Hence, the Accused is being afforded the right to *habeas corpus* and the opportunity to challenge the legality of his detention in Federal Court.

4) Right to be Informed Promptly of Charges

a) Defense asserts that the government failed to notify him promptly of the charges against him in accordance with the ICCPR. The assertion that an enemy combatant has a right to be "informed promptly of charges" only underscores the absurdity of the notion that the ICCPR applies to international armed conflict. Such a provision clearly contemplates domestic criminal charges, not detention of an enemy combatant to keep him off the battlefield.

b) The rules applicable to service of charges, once approved, are instead found in Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (MCO No. 1). MCO No. 1 requires the Prosecution to "furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English, and if appropriate, in another language that the Accused understands." MCO No. 1, para. 5A. See also MCO No. 1, para. 6A(3) (Prosecution shall provide copies of the charges approved by Approving Authority to the Accused and Defense Counsel). In the Accused's case, the Approving Authority approved the Accused's charges on 9 June 2004. Per Defense

Counsel's request, the Prosecution served Defense Counsel (rather than the Accused) with the charges on 10 June 2004, well in advance of the scheduled 25 August 2004 initial hearing and well in advance of the scheduled trial date of 10 January 2005. Thus, the government has fully complied with MCO No 1.

c) Defense, without citing authority, asserts that a "procedural clock" started on 3 July 2003. As discussed further in the Prosecution's response to Defense's Speedy Trial Motion of 4 October 2004, there is no procedural clock. Active hostilities against the al Qaida network and the Taliban continue; the Accused is being held as an unlawful enemy combatant.

5) Right to be Brought Promptly Before a Judge

Asserting the right to go before a judge and contest the lawfulness of his detention within a "few days" again illustrates that the provisions cannot apply to battlefield conditions. As discussed previously, *Hamdi* and *Rasul* work together to address the opportunity for detainees to challenge judicially their detention. *Hamdi*, 124 S. Ct. at 2648; *Rasul*, 124 S. Ct. 2686. And as discussed, the United States has completed a CSRT with respect to the Accused.

e. Conclusion.

The United States has a fundamental right, if not responsibility, to capture, detain, and try unlawful enemy combatants. The Accused's detention has been reviewed by a number of administrative processes, all confirming that the Accused is properly detained as an enemy combatant. Furthermore, the Accused has had the opportunity to challenge his detention before a U.S. District Court, where his *habeas corpus* petition is pending. The Accused's detention as an enemy combatant is proper and justified; the Defense Motion should therefore be denied.

6. Attached Files. None.

7. List of Legal Authority Cited.

a. 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States (2004).

b. *Authorization for Use of Military Force*, 115 Stat. 224 (2001).

c. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

d. International Covenant on Civil and Political Rights.

e. Additional Protocol I to the Geneva Conventions, Art. 75.

f. Major Timothy C. MacDonnell, Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, *The Army Lawyer*, 19, 20 (March 2002).

g. *Ex parte Quirin*, 317 U.S. 1, 27 (1942).

h. Jean Pictet, *Humanitarian Law and Protection of War Victims*, 15 (1975).

i. Executive Session, International Covenant on Civil and Political Rights, 138 Cong. Rec. S 4781 (Apr. 2, 1992).

j. Assistant Secretary of State Richard Schifter, International Covenant on Civil and Political Rights (ICCPR) Hearing, 18, (1992).

k. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004).

l. *Wesson v. Warden*, 305 F.3d 343, 348 (5th Cir. 2002).

m. Law of War Handbook, International & Operational Law Department, The Judge Advocate General's School, U.S. Army, 23-24 (2005).

n. *United States v. Fort*, 921 F. Supp. 523, 526 (N.D. Ill. 1996).

o. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

p. Navqi, Doubtful Prisoner of War Status, 84 Int'l Rev. Red Cross 571, 572 (2002).

q. Fact Sheet, White House, Status of Detainees at Guantanamo (Feb. 7, 2002), www.defenselink.mil.

r. Squitieri, Army begins sending more troops to Afghanistan, *USA Today*, Sept. 22, 2004, www.usatoday.com/news/washington/2004-09-22-afghan-troops_x.htm.

s. Fact Sheet, Department of Defense Guantanamo Detainees (Apr. 13, 2004), www.defenselink.mil/news/Apr2004/d20040406gua.pdf.

t. Department of Defense News Release, Combatant Status Review Panel Order Issues (July 7, 2004).

u. Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism.

v. Presidential Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 F.R. 57833 (2001).

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

9. Witnesses/Evidence. None anticipated.

//Signed//

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